# In the Supreme Court of the United States

**OCTOBER TERM, 1943.**

**No. . . . . .**

IRWIN UNGER,
*Petitioner,*

vs.

THE OHIO STATE DENTAL BOARD,
*Respondent.*

## BRIEF OF PETITIONER
### In Support of Petition For Writ of Certiorari.

The license of petitioner to practice dentistry was revoked by the Ohio State Dental Board. This action was confirmed by the Court of Common Pleas of Cuyahoga County, Ohio, the Eighth District Court of Appeals and the Ohio Supreme Court. The Opinion of the Ohio Supreme Court is hereto attached and marked "Appendix No. 1."

The charges on which this finding was made appear in a Petition for a Writ of Certiorari, pages 2, 3, 4 and 5, and are a tangle of words and phrases that allege that the petitioner violated every restriction of General Code 1325 with the exception of the fact that he was not convicted of a crime.

Section 1325 is as follows:

> "License may be revoked or suspended, when. The state dental board may warn, reprimand, or otherwise discipline a licensee for any violation of its rules or of any laws pertaining to the practice of dentistry or dental hygiene and in addition thereto may revoke or suspend a license obtained by fraud or misrepresentation, or if the person accused is convicted subsequent

to the date of his license of a felony involving moral turpitude, or is convicted for the violation of any provisions of the law regulating the practice of dentistry or dental hygiene, or becomes guilty or chronic or persistent inebriety or addiction to drugs; or if the person holding such license makes use of any advertising statements of a character tending to deceive or mislead the public, or advertises or publishes false, fraudulent or misleading statements of his superior skill or knowledge or the superior nature of his methods of treatment or practice; or advertises by means of large display, glaring light sign, or sign containing as a part thereof the representation of a tooth, teeth, bridge work or any portion of the human head; or employs or makes use of advertising solicitors or publicity agents; or advertises any free dental work or free examination; or advertises to guarantee any dental service; or to perform any dental operation painlessly; or has been found guilty of employing or permitting an unlicensed person to perform dental operations which, under this act, can only be performed by a person licensed to practice dentistry in this state; or is guilty of any grossly immoral conduct tending to deceive or defraud the public; or which disqualifies him to practice with safety to the public. All advertising by any medium whatsoever including radio, must conform to the requirements of this section."

On July 31, 1941, the Ohio State Dental Board found the petitioner guilty as follows:

1. That between the dates of April 15, 1941, and June 19, 1941, the said Dr. Irwin Unger has made use of advertising solicitors or publicity agents in violation of Section 1325 General Code of Ohio.

2. That during the same period the said Dr. Irwin Unger has made use of advertising statements of a character tending to deceive or mislead the public, in violation of Section 1325 General Code of Ohio.

3. That the said Dr. Irwin Unger is guilty of grossly immoral conduct tending to deceive or defraud the public; or which disqualifies him to practice with

safety to the public, in violation of Section 1325 General Code of Ohio.

4. That the said Dr. Irwin Unger having a license to practice dentistry in the State of Ohio, was a party to an arrangement of a type prohibited by Section 1329 General Code of Ohio with the State Dental Laboratory.

(Record, pages 14 & 15.)

Error was prosecuted to the Court of Common Pleas of Cuyahoga County, Ohio, which court made the following finding and which finding was affirmed by the Court of Appeals, Eighth District of Ohio, and the Ohio State Supreme Court:

"Said Dr. Irwin Unger made use of advertising solicitors and/or publicity agents, to-wit: Henry Urden and/or Edward Urden, doing business as State Dental Laboratory, Edward Urden and/or Henry Urden and State Dental Laboratory, between the times of Jan. 15, 1941, and June 19, 1941." (Rec. p. 23.)

The petitioner is a duly licensed dentist. He opened an office in the Cleveland Arc de, a downtown office building in Cleveland, Ohio, on April 1, 1941 (R. pp. 111-115), as one of six or seven other dentists having offices in that building.

The State Dental Laboratory was an office where the general public could get broken plates repaired or duplicated. It was also located in the Arcade Building. No dentists were employed by the Laboratory, but this Laboratory did advertise to the general public that it repaired false dentures and duplicated false plates of teeth. This Laboratory was a lawful enterprise.

It had operated from October, 1939, to August, 1941. While it is the finding of the Ohio State Dental Board that the petitioner made use of this Laboratory as an advertising solicitor from January 15, 1941, to January 19, 1941, it must be noted that he did not open his office in the Arcade until April 1, 1941.

The petition on which the cause of action is based was sworn to by Ernest H. Sellers, who is an inspector for the Ohio State Dental Board. His testimony, however, does not confirm any of the allegations set forth in the petition (R. pp. 103-109) and the claim rests upon the testimony of three witnesses—one of whom was a paid informer and another received money from the agent of the respondent.

The informer was Elmer Clupper. (R. pp. 50-55.) On May 1, 1941, he was hired by Inspector Sellers and Dr. William Sterling, a member of the Ohio State Dental Board. At their instance he went to the State Dental Laboratory (R. p. 41) and over the objection of the petitioner he was permitted to testify to a communication he had with a man at the State Dental Laboratory. He could not identify this man but testified that he was given a card and instructed to go to appellant's office. He then visited appellant's office and an impression was taken of his mouth, for which he paid three dollars. That impression was then delivered to Dr. Sterling and Sellers and he was paid for his services. He further stated that he had no conversation with petitioner.

The next witness was Gertrude Quarles. (R. pp. 60-67.) She likewise was permitted over objections to testify to a conversation with a lady in the State Dental Laboratory, who is not identified. Her testimony was to the fact that this lady referred her to the petitioner's office—he made an impression of her mouth and she paid him three dollars. This was May 1, 1941.

As she was leaving the Arcade she was stopped and questioned by Dr. Sterling and Sellers. She stated that she had no complaint about the service that had been given her in the petitioner's office, but appeared in court solely because she was summoned. Her husband was called to verify these facts. (Rec. p. 67.)

The third witness was Frances Sanders, a resident of Lorain. (R. pp. 85-90.) On April 18, 1941, with her hus-

band she visited the State Dental Laboratory and likewise over objections was permitted to tell that some man sent her to Dr. Unger's office. She went to the office where, after an examination, Dr. Unger was unable to make a good impression because of the condition of her mouth. He charged her five dollars and notified her to return.

Like the witness Quarles, she was stopped by Sellers and Dr. Sterling when leaving the Arcade and they secured her name and address. The next day Sellers called at her home in Lorain and told her not to come back to Dr. Unger's office and paid her ten dollars.

These three incidents—one on April 18, 1941, and two on May 1, 1941, are the basis of the court's finding that the petitioner made use of the State Dental Laboratory as an advertising solicitor and publicity agent between January 15, 1941, and June 19, 1941.

No person from the State Dental Laboratory was called as a witness. Each of the witnesses was permitted to testify to conversations that they had with unidentified persons who were in the office of the State Laboratory, which conversations were out of the hearing and presence of Dr. Unger. No conspiracy was alleged in the petition, neither is there the slightest evidence of the existence of a conspiracy between the State Dental Laboratory and the petitioner. Objections of the petitioner to this type of testimony were overruled as appears on pages 42, 43, 44, 45, 46, 48, 49, 55, 58, 61, 62, 63, 64, 65, 68, 69, 70, 71, 79, 80, 82, 86, 87, 88, 89, 102, 104, 106, 107, 122 of the record.

When the case was heard on appeal by the Court of Common Pleas, it was stipulated (R. p. 25) that the record of the proceedings before the Board would be evidence before the Court, and that the Court should rule on the objectionable evidence in the manner as set forth in this statement which appears on page 26 of the record.

> "The Court: I will use a pencil to indicate the remarks on the margin of the page where objections are

found, and sign my initials 'H.W.E.,' with a circle around my name."

The record shows that the Court did not rule on all objections. In the several instances where he did rule, except one which appears on page 71, he followed the rulings of the State Dental Board. No rulings were made by the Court to the objections which appear on pages 45, 49, 61, 63, 65, 79, 80, 82, 85, 86, 87, 88, 89, 101, 102, 104, 107 and 122.

It is fundamental that conversations and acts are permissible when they are a part of the *res gestae* or when a conspiracy has been alleged and proven, or when they are in the presence or hearing of the adverse party. Otherwise they are not.

Without the admission of this hearsay evidence, there is absolutely nothing to connect the petitioner with the State Dental Laboratory.

As reason for granting the writ we submit the following authorities:

> "The admission over objection of hearsay evidence is a ground for reversal if such evidence is of a nature to be damaging to the adverse party." (17 *Ohio Jurisprudence*, p. 278.)
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> "Probably the most important objection to admitting hearsay testimony in evidence is that the declarant is not present and available for cross examination. The exercise of the right to cross examine the witness of the adverse party is regarded as, and is in fact, essential in the administration of justice to discover the falsity of testimony and prevent the admission of perjured testimony." (*American Jurisprudence*, Vol. 20, page 201, paragraph 452.)

*Wigmore's Code of the Rules of Evidence*, Second Edition, page 259:

> "Hearsay Rule in General.
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> "Rule 147. General Principle. Every human assertion, offered testimonially (Rule 28, Art. 1, ante

No. 201), i.e. as evidence of the truth of the fact asserted, must be subjected to two tests (W. No. 1362):

(1) The person making the assertion must be subjected to cross examination by the opponent, i.e. must make it under such circumstances that the opponent has an adequate opportunity, if desired to test the truth of the assertion by questions which the person is compellable to answer;

(2) The person making the assertion must be confronted with the opponent and the tribunal, i.e. must be in their presence when making the assertion and giving his answers."

*Thomas A. Delaney, Petitioner, v. United States of America*, 263 U. S. 586, 68 Law Ed. 462, syllabus (3):

"3. The admission of hearsay evidence against objection is reversible error, as depriving accused of the constitutional right to be confronted with the witnesses against him."

68 Law Ed. page 465:

"It is contended that hearsay evidence was received against petitioner, and this is erected into a charge of the deprivation of his constitutional rights to be confronted with the witnesses against him. Hearsay evidence can have that effect, and its admission against objection constitute error. *Diaz v. United States*, 223 U. S. 442, 450, 56 L. Ed. 500, 503, 32 Sup. Ct. Rep. 250, Ann. Cas. 1913C, 1138; *Rowland v. Boyle*, 244 U. S. 106, 108, 61 L. ed. 1022, 1023, P. U. R. 1917C, 685, 37 Sup. Ct. Rep. 577; *Spiller v. Atchison, T. & S. F. R. Co.*, 253 U. S. 117, 130, 64 L. ed. 810, 819, 40 Sup. Ct. Rep. 466."

*James Donnelly, Plaintiff in Error, v. United States*, 228 U. S. pages 242, 243; 57 Law Ed. 820, 821, syllabus (12):

"12. The extrajudicial confession of a third person, since deceased, that he had committed the murder with which the accused is charged, is not admissible in evidence in behalf of the accused."

The following from the opinion, page 275, 58 Law Ed. 834:

"We do not consider it necessary to further review the authorities, for we deem it settled by repeated decisions of this court, commencing at an early period, that declarations of this character are to be excluded as hearsay.

*Queen v. Hepburn* (1813), 7 Cranch, 290, 295 L. ed. 348, 349, was a suit in which the petitioners claimed freedom, and certain depositions were rejected by the trial court as hearsay. This Court, speaking through Chief Justice Marshall, said:

'These several opinions of the court (meaning the trial court) depend on one general principle, the decision of which determines them all. It is this: that hearsay evidence is incompetent to establish any specific fact, which fact is in its nature susceptible of being proved by witnesses who speak from their own knowledge. * * * It was very justly observed by a great judge that all questions upon the rules of evidence are of vast importance to all orders and degrees of men; our lives, our liberty, and our property are all concerned in the support of these rules, which have been matured by the wisdom of ages, and are now revered from their antiquity and the good sense in which they are founded.' One of these rules is that 'hearsay' evidence is in its own nature inadmissible. That this species of testimony supposes some better testimony which might be adduced in the particular case is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practised under its cover, combine to support the rule that hearsay evidence is totally inadmissible. * * * The danger of admitting hearsay evidence is sufficient to admonish courts of justice against lightly yielding to the introduction of fresh exceptions to an old and well established rule, the value of which is felt and acknowledged by all. If the circumstance that the eyewitnesses of any fact be dead should justify the introduction of testimony to establish that fact from hearsay, a claim

to which might be supported by proof so easily obtained. * * * This court is not inclined to extend the exceptions further than they have already been carried.

This decision was adhered to in *Davis v. Wood* (1816) 1 Wheat. 6, 8, 4 L. ed. 22, 23; *Scott v. Ratliffe* (1831) 5 Pet. 81, 86, 8 L. ed. 54, 55; *Ellicott v. Pearl* (1836) 10 Pet. 412, 436, 437, 9 L. ed. 475, 485, 486; *Wilson v. Simpson* (1850) 9 How. 109, 121, 13 L. ed. 66, 71; *Hopt v. Utah* (1884) 110 U. S. 574, 581, 28 L. ed. 262, 265, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417. And see *United States v. Mulholland,* 50 Fed. 413, 419."

The petitioner claims that the Ohio State Dental Board was not a fair and impartial board. Dr. William Sterling sat as a member of the Board and participated during part of the hearing as judge of petitioner's conduct. When it was developed, and not until then, that he had hired and paid the witness (R. p. 52), Elmer Clupper, he decided he would not continue to participate in the case (R. pp. 54-55), although he knew that when he started into the case and during the testimony of Elmer Clupper that the witness had been hired and paid by him.

Under the circumstances there can be no question but that his activities met with the approval of the Board and his presence during the trial and his membership on the Board could not help but have a prejudicial effect to the cause of the petitioner. This is the kind of a trial which was condemned by the United States Supreme Court in the case of *Tumey v. State, etc.,* 273 U. S. 510, syllabus (2):

"An accused is unconstitutionally deprived of due process of law if his liberty and property are subjected to the judgment of a court the judge of which has a direct and substantial pecuniary interest in reaching a conclusion against him."

WHEREFORE, it is prayed for the reasons stated and on the authorities of the cases cited that this Petition be granted.

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